SUPREME COURT U. S.

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

v.

THE HANOVER SHOE, INC.,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Shoe Machinery Corporation (herein "United"), defendant below, prays for issuance of a writ of certiorari to review the judgments of the Court of Appeals for the Third Circuit entered April 11 and May 18 (on rehearing) 1967. Respondent The Hanover Shoe, Inc. (herein "Hanover"), plaintiff below, has petitioned in No. 335 for issuance of a writ of certiorari with respect to the same judgments of the Court of Appeals and United has opposed that petition. This petition of United is in the nature of a cross-petition, the writ here sought to issue only in the event this Court shall grant Hanover's petition in No. 335.

Opinions Below

The opinions of the Court of Appeals, dated April 11 and May 18 1967 are not yet officially reported. They are attached as Appendix A to Hanover's petition in No. 335. The opinion of the District Court for the Middle District

of Pennsylvania is reported in 245 F. Supp. 258. The opinion of the District Court on the trial of a preliminary issue under Federal Rule 42(b) is reported in 185 F. Supp. 826, that of the Court of Appeals in 281 F. 2d 481, and the denial of certiorari on that issue in 364 US 901.

Jurisdiction

The judgment of the Court of Appeals affirming in part and reversing in part the District Court and directing a second trial was entered April 11 1967 and the judgment denying petitions by both parties for rehearing was entered May 18 1967. Jurisdiction is invoked under 28 USC § 1254(1).

Questions Presented

In a private antitrust suit under Clayton Act § 4 claiming damages (to be trebled) from injury assertedly caused by defendant's monopolization and relying on the prior decree in a Government suit pursuant to Clayton Act § 5(a)—

1. May the trial court determine that an antitrust violation had been adjudicated solely by traveling outside the Government decree and erroneously interpreting the copious supporting findings of the Government antitrust court where the Government decree on its face dismissed with prejudice the allegation of such antitrust violation?

2. Where the judgment in the Government antitrust case represented a departure from the established prior course of decision as respects defendant's machinery leasing system and determined monopolization in 1953 by reason of an intervening change in decisional law, should the 1953 judgment reflecting such change of the law be given retroactive effect for the purposes of a private damage claim for a period commencing in 1946?

3. If the proper scope and the extent of retroactivity of the underlying Government antitrust decree are in question and are decisive of the claims in a private antitrust suit based thereon, should not the trial court upon the request of defendant have certified such points to the Government antitrust court for guidance by it and to avoid confusion and conflict after the Government antitrust court had clearly indicated that such confusion and conflict existed?

4. Where the parties had dealt solely upon the basis of leases lawful in form and reasonable in their terms, does plaintiff-lessee have a cause of action for damages expressed in terms of an allegedly cheaper purchase price because of inability to purchase the same machinery from defendant?

5. Where plaintiff shoe manufacturer's claimed damages are based on a comparison of a putative cost of purchasing defendant's shoe machines with the cost of leasing them, should not the putative cost of purchasing take into account the cost of capital to plaintiff?

6. Does a lessee of shoe machinery sustain injury within the meaning of Clayton Act § 4 from a monopolization by defendant of the shoe machinery market under circumstances in which such lessee's entire cost of using such machinery is incorporated by it in its sales prices to the public and absorbed in regularly increased profits?

7. Where plaintiff shoe manufacturer and defendant shoe machinery manufacturer had over a period of more than 50 years dealt on a lease basis without protest on plaintiff's part and on terms identical to those enjoyed by plantiff's competitors and defendant's other customers, does a cause of action arise for plaintiff's inability to purchase from defendant the same machines in the absence of a prior demand by plaintiff to purchase?

8. Upon the assumption of a violation of the antitrust laws by virtue of defendant shoe machinery manufacturer's failure to offer for sale its machinery which was acquired by plaintiff shoe manufacturer on a lease basis only, does not the cause of action under Clayton Act § 4 accrue upon the first impact of the lease-only policy upon a plaintiff's business (in 1912 or earlier) with the result that the statutory bar was complete before the filing of suit in 1955?

Pertinent Statutes

The statutes pertinent to the questions presented are Sherman Act § 2, 15 USC § 2, and Clayton §§ 4 and 5 (a), 15 USC §§ 15 and 16(a), printed in Appendix C to Hanover's petition in No. 335.

Statement of the Case

The action is one for treble damages under the antitrust laws and was filed September 21 1955 by Hanover, which since at least as early as 1912 has been a shoe manufacturer and lessee of shoe machinery manufactured by United. Hanover based its case (728a-29a)* on a decree entered by the United States District Court for Massachusetts (Wyzanski, J.) in 1953 in a Government antitrust action against United. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, aff'd per curiam 347 US 527. The complaint herein charges United with monopolization of the shoe machinery industry since 1912 and claims dam-

*These references are to pages of United's appendix in the Court of Appeals, filed in this Court together with Hanover's petition in No. 335, which pursuant to the Court's Rule 21(5) also constitutes the record on the cross-petition herein.

ages by virtue of alleged excessive lease charges to Hanover and its inability to acquire shoe machinery by purchase (19a).

The 1953 decree found as "means whereby defendant monopolized the shoe machinery market" particular types of leases which included a ten-year term, a full-capacity clause, or deferred payment charges, and leases under which United rendered repair and other service without separate charge (110 F. Supp. at 352).

Leasing as such was not condemned by the decree—only certain lease clauses and practices (*ibid.*). Nor were future leases proscribed provided that they omitted the monopolizing provisions and provided that the same machines offered in the future for lease were likewise offered for sale. (*ibid.*) The only "means" of monopolization set forth in the decree were leases in the particular form thereafter expressly outlawed. Thus, the decree did not adjudicate that United's asserted refusal to sell its machines violated the Sherman Act.

In conformity with the decree itself, Judge Wyzanski in his opinion adverted to the historical tradition of leasing in the shoe machinery industry, the absence of expressed dissatisfaction from consumers respecting that system, the ease of entry into shoe manufacture, the uniformity of United's lease rates, the excellent performance of United's machines, and its prompt and efficient repair and other services (110 F. Supp. at 340). Judge Wyzanski found that the particular type of lease theretofore used by United deterred a shoe manufacturer from obtaining a competitor's machine "more than if he owned that same United machine, *or if he held it on a short lease* carrying simple rental provisions and a reasonable cancellation before the end of the term" (*ibid.*) (emphasis added). It was the particular form of "long-term, complicated leases" (*id.* at

343) with the indicated "exclusionary features" (*id.* at 344) that were condemned, and leases as such were not abolished (*id.* at 349). There were no "predatory practices", "few monopolies could produce a record so free from any taint of that kind of wrong-doing" (*id.* at 345), and virtually all shoe manufacturers who testified preferred the leasing system (*id.* at 349). In light of three earlier decisions of this Court which specifically involved United and which left its activities "uncondemned" and "in part endorsed", "it would be anomalous to charge the officers of United with any moral deficiency" (*id.* at 348).

In requiring that machines *in the future* be offered for sale as well as for lease, Judge Wyzanski specifically stated that the principal merit of that proposal was not "in widening the choices" of customers, since "it may be assumed that the antitrust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products" (*id.* at 349-50). Rather, the merit was in the future creation of a second-hand market as further competition in order to erode the market power of United maintained by the exclusionary features of the leases (*ibid.*).

On the basis of that decree the District Court herein rejected Hanover's primary claim that the leasing charges were excessive because the Government decree, "on which Hanover relied, had made no finding that United's leasing charges were excessive" (Pet. 5a).* But the District Court held that the Wyzanski decree and decision were prima facie evidence under Clayton Act § 5(a) that United had in the past violated the antitrust laws by not offering its machines for sale, since the court observed that Judge Wyzanski had found the particular leases in question to be

*Such references are to pages of Appendix A to Hanover's petition in No. 335.

"means" of monopolization and had decreed that in the future the machines should be offered for sale as well (752a). The District Court concluded that Hanover "would have purchased" the more important machines (774a).

The District Court entered judgment for Hanover in the amount of $4,239,609 with interest, and for $650,000 attorneys' fees in addition (873a). The basis of this decision was that the difference between the aggregate lease charges for the machines in question during the damage period—albeit reasonable as lease charges—and the price for which the court calculated Hanover could have bought the machines if they had been offered for sale was $1,482,462 (859a), which amount less interest was trebled in the judgment.

On appeals by both parties the Court of Appeals vacated the judgment and directed a new trial. The court agreed in part with United's claim that the decree adverse to it in the Government antitrust suit should not be retroactively applied by holding that United was justified in its business practices with respect to the leasing of shoe machinery up to the date in 1946 when this Court approved Judge Learned Hand's holding in the *Alcoa* case (*American Tobacco Co.* v. *United States,* 328 US 781, 811-15). The court confined damages to the period commencing at that time and held that the damage period should end not at the date of filing of the complaint, but on June 1 1955 when conversion from leasehold to ownership of the United machines first became possible as an alternative by reason of Judge Wyzanski's approval of the appropriate plan under the decree.

The Court of Appeals also reversed the District Court for its failure to take into account the tax advantages of leasing for the purpose of comparing ownership cost with lease cost. On Hanover's appeal from the exclusion of one of United's machines from the damage calculation by virtue

of the availability of a comparable outside machine, the Court of Appeals remitted this item for reconsideration by the District Court in view of the changes directed to be made in the damage period.

Reasons for Granting the Writ

1. Lease-Only Was Not Adjudged a Violation.

The courts below went beyond the permitted limits of the statutory estoppel created by Clayton Act § 5(a), 15 USC § 16(a), which confines the effect of a Government antitrust action to the judgment or decree itself in the following words:

> "A final judgment or decree . . . shall be prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . ."

Judge Wyzanski's decree in 110 F. Supp. at 352 did not find an antitrust violation in respect of United's failure to sell shoe machines in the preceding period, whereas the predicate erroneously employed by the courts below was that the decree did so find. Judge Wyzanski set forth the violations in paragraph 4 of the decree (*ibid.*) not in terms of failure to sell or in terms of leases as such but only leases including (a) a ten-year term, (b) a full-capacity clause, (c) deferred payment charges, or (d) the rendition of repair and other services without separate charge. Nothing else was embraced in the decree as a violation of law. To the contrary, paragraph 2 declared in part (*ibid.*):

> "The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice."

These other charges include the specific charge of refusal to sell machines which the courts below erroneously determined to have been adjudicated a violation. That is to say, one of the paragraphs of the Government complaint dismissed with prejudice by Judge Wyzanski in paragraph 2 of his decree was paragraph 61 listed in the complaint under "Offenses Charged":

> "61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases. . . ." (Pet. 13a)

The Court of Appeals seemed to recognize the force of this argument. It said (Pet. 13a):

> "The [Government] decree does not contain any comparable declaration regarding United's failure to make shoe machinery available for sale. . . . On the face of the decree, therefore, United's contention is not lacking in merit."

The extension by the courts below of the estoppel created by Congress exceeded the courts' power and resulted in an injustice to United made particularly severe by the Draconian sanction of treble damages. The decision below conflicts with the very cases recognized by the District Court (749a) as controlling on the scope of the statutory estoppel. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 US 89, 102; *Emich Motors Corp.* v. *General Motors Corp.*, 340 US 558, 569. The Court of Appeals misinterpreted the applicability of the *Emich* decision to the Wyzanski decree (Pet. 14a). The general jury verdict in *Emich* necessitated going beyond the verdict itself to determine the components of the violation. The Court in *Emich* therefore endorsed an inquiry into matters of fact and law "necessarily decided by the conviction and the verdict".

(*Ibid.*) By contrast to a general jury verdict there was no need with respect to the equity decree here involved to go beyond the decree to determine what was "necessarily decided". The components of the violation are set forth in the decree itself.

2. The Government Decree Is Not Retroactive

Having mistakenly attributed to Judge Wyzanski a finding that United's failure to sell was an antitrust violation, the courts below then further read retroactive condemnation into Judge Wyzanski's decision—erroneously, in our submission.

To the trial of the Government case which underlies the action at bar United came vested with three decisions of this Court in its favor. Judge Wyzanski recognized this (110 F. Supp. at 348):

> "The Supreme Court had three times, in *United States* v. *Winslow*, 227 U. S. 202, 33 S. Ct. 253, 57 L. Ed. 481, *United States* v. *United Shoe Machinery Company of N. J.*, 247 U. S. 32, and *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708, reviewed aspects of this company's, or its predecessor's activities. What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed."

These amounted to a sanction of United's leasing and other business procedures up to the time of the actual decision in the Government case, and Judge Wyzanski's review of its history acquitted United of predatory practices and recognized its leases and leasing practices as "natural and normal, for they were, in Judge Hand's words, 'honestly industrial'." (110 F. Supp. at 343, 344)

In the special circumstances of United's history in the courts the rule of the Massachusetts court should not be taken to reflect pre-existing law. As to United it represented a change in law as of 1953. The District Court herein applied the 1953 remedy determination of the Massachusetts court as a pre-existing rule of substantive law. The Court of Appeals, however, adopted a compromise position and held that United was entitled to the benefit of its conformity with the antitrust law as it existed up to the date of the change therein effected by the *Alcoa* case and this Court's approval of *Alcoa* in the *American Tobacco* case in 1946 (110 F. Supp. at 348). The Court of Appeals recognized that the Blackstonian view

> ". . . that the law has always been what the latest case for the first time declares it to be . . . must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary." (Pet. 22a-23a)

Thus even the Court of Appeals to that extent recognized that United enjoyed "the approval of its leasing policy in various forms by three successive decisions of the Supreme Court" (Pet. 22a).

We submit that the decision in the *American Tobacco* case could have no bearing upon United as marking a change in its legal obligations until Judge Wyzanski in 1953, and this Court by its affirmance of his decision, so determined. Up to that time the leasing practices of United, which were fully before this Court on the three previous occasions, had judicial sanction in the context of United's particular business practices. Those were not the practices of Alcoa, nor were they the practices of American Tobacco Company. The rule announced in the *American Tobacco* case as to the requirement of exclusion of competitors,

confirming Judge Learned Hand's result in the *Alcoa* case, could not reasonably be deemed to have had a bearing on the leasing practices of United as previously approved by this Court until the trial court actually held that it did upon an analysis of the terms and the operation of the United leases.

3. The Decree-Interpretation Question Should Have Been Certified to the Court Which Entered the Decree.

Even if it were proper for the courts below to go beyond the Government decree to determine what was adjudged an antitrust violation and whether any such adjudication should be given retroactive effect, the lower courts' refusal to certify to Judge Wyzanski the interpretation of his antitrust decree gives rise to a conflict between the decision below and the very decree in question (aff'd. per curiam 347 US 527) as interpreted by Judge Wyzanski. Moreover, the refusal to certify conflicts with *United States Gypsum Co.* v. *National Gypsum Co.*, 352 US 457, on the appropriateness of such certification, represents an unwarranted departure from the proper course of judicial proceedings, and has spawned numerous errors of law in the erroneous use of the 1953 decree as a basis for finding pre-decree antitrust violation.

From a single reading of the Court of Appeals decision two facts stand out above all others. First, Hanover's action for treble damages rested entirely on the 1953 decree in the earlier Government action (728a-29a; see Pet. 5a) and, second, the principal task of the courts below was to interpret and apply Judge Wyzanski's decree. After the initial description of the trial of the Government action in terms of its "prodigious length", the extensive testimony and documentary evidence and finally the "elaborate opinion" of Judge Wyzanski (Pet. 2a-3a), the Court of Appeals makes constant reference to that decision, such

as "We turn then for illumination to the elaborate findings of fact and opinion of Judge Wyzanski" (Pet. 14a), "Judge Wyzanski made vividly clear" (Pet. 20a) and Judge Wyzanski stressed" (Pet. 21a).

What have become the most important questions of interpretation, however, are whether Judge Wyzanski intended to adjudicate that United's policy of offering its more important machines for lease-only constituted an antitrust violation and, if so, whether such adjudication should be given retroactive effect. United had good cause to believe that resort to Judge Wyzanski was unnecessary until Judge Sheridan held not only that the lease-only policy was illegal but also that retroactive effect should be given to a purely remedial decree. First, as the court below recognizes (adding that on the "face of the decree . . . United's contention is not lacking in merit" (Pet. 12a)), the Wyzanski decree nowhere declared that failure to sell was a means of monopolization, although the Government had in its complaint expressly so charged, and in addition the decree "dismissed with prejudice" all charges not otherwise dealt with (Pet. 13a). In fact, at the close of the Massachusetts action Government counsel had himself urged upon Judge Wyzanski (814a):

> "The remedial relief for which the Government is contending is intended to give an economically justifiable resolution to an economic condition or state of affairs. Such remedial relief does not depend upon the evaluation of the gravity or culpability of the individual practices engaged in by the defendant, and is not geared into such an assessment or evaluation."

Second, United's interpretation of the decree had been confirmed by the United States District Court for the Western District of New York on April 12 1963 in *W. B.*

Coon Co. v. *United Shoe Machinery Corp.*, Civil No. 6841, a treble damage action commenced by another shoe manufacturer with exactly the same form of complaint as Hanover's. In that case Judge Burke entered judgment for United and held that "Defendant's policy of lease-only as to certain machines during the period 1939 through 1954 was not by itself illegal."*

Thus, no need to seek a construction from Judge Wyzanski arose until Judge Sheridan's opinion was rendered below on April 28 1965 (800a). Thereafter, notice of United's application to Judge Wyzanski for a construction of his decree was given May 21 (806a), a hearing was held before Judge Wyzanski May 28 at which for comity reasons he refrained from formal action without a certification from Judge Sheridan (816a-44a), and the record on that application together with a motion by United for partial new trial and for a certification was filed with Judge Sheridan June 9 (801a-03a), all well before entry of judgment on August 13 1965.

Yet the requested certification was denied by Judge Sheridan and the Court of Appeals has upheld the denial, notwithstanding the Court of Appeals' belief (Pet. 25a, 26a)—

> "The obvious economy in judicial effort which would follow from such a practice [certifying the questions to Judge Wyzanski], especially in a case as protracted as the Government suit against United, speaks strongly in its favor."

* * *

*So, too, in *Laitram Corp.* v. *King Crab, Inc.*, 244 F. Supp. 9, 18 (D. Alaska 1965), the court stated that Judge Wyzanski held "that the leasing of machinery and refusing to sell does not constitute an unlawful practice in violation of the Sherman Act where the rates are uniform and do not weaken barriers to entry by competitors into the same field."

> "United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below."

Solely on the basis of supposed "untimeliness" the Court of Appeals concluded that it "need not determine this interesting question", citing *United States Gypsum Co.* v. *National Gypsum Co.*, 352 US 457.

In *Gypsum* the Court expressly approved submission to the antitrust court (District of Columbia) of questions arising in the treble damage court (Iowa) *after judgment in the treble damage court*—contrary to the result reached in the instant case. (*Id.* at 463-64) There too the need for such submission became apparent only after the decision. Here as in *Gypsum* the antitrust court's decree expressly retained antitrust jurisdiction in order that upon application of any of the parties the court might make such directions or orders as it deemed appropriate for the correction, construction and carrying out of the decree (806a-07a), and it was that reservation of jurisdiction which prompted the Supreme Court in *Gypsum* to conclude that submission to the antitrust court was appropriate to "avoid multiple litigation and possibly conflicting decision." (*Id.* at 464)

The raw injustice resulting from the denial of certification is best evidenced by Judge Wyzanski's plain intimation at the hearing on May 28 1965 of his disagreement with Judge Sheridan's construction. Having been advised by United's counsel that United sought to determine whether, contrary to Judge Sheridan's view, Judge Wyzanski by his decree did not adjudicate that the lease-only policy was an antitrust violation or retroactively condemn United's conduct (824a, 826a-27a), Judge Wyzanski stated to Gov-

ernment counsel in the presence of counsel for United and Hanover (834a-37a):

> "And I suppose you have no more doubt than Mr. Carson [United counsel] has as to what was my intention when I entered the Decree . . . . Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was? . . . Now that you are here, are you not aware from being here on previous occasions that *the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?* Are you not aware of that? . . . I ask you as lawyer, on your honor as a lawyer. . . . I am asking you, and I will hold it as a statement of your character as well as your competence. . . . No one who knows me will misunderstand the nature of my questions and comments even if on the jurisdictional ground I find it inappropriate to give the relief asked." (Italics supplied)

Judge Wyzanski refused on the ground of comity to intrude his views in the absence of a certification from his fellow judge (841a-43a; Pet. 26a), clearly indicating a willingness to certify his opinion upon request in the manner encouraged by this Court for consultation between State and Federal courts (831a-32a). At the conclusion Judge Wyzanski also added reference to the remarks quoted above;

> "But I deem it appropriate expressly to call attention to the full range of the colloquy which preceded my ruling as well as briefly to summarize what seemed to me to be the determinative considerations." (841a)

* * *

> ". . . I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed beyond eliminating violations to setting forth a program of future conduct which would make it hereafter less likely that the violations could continue." (843a)

In obvious awareness of the injustice being worked with his decree Judge Wyzanski with characteristic prescience saw fit to add (842a):

> "I have that regard for Judge Sheridan personally and for the Court on which he sits to be loath to intervene at this stage in a way that at any rate the general public would assume to be a kind of review of his action, and indeed, if I decided as I am asked to decide, an undercutting of his position. There are available remedies by way of appeal certainly to the Court of Appeals for the Third Circuit; and if by any chance that Court should affirm the Decree of the District Court, this would appear to be the kind of case in which the Supreme Court of the United States might well indulge its power to grant a petition for certiorari."

4. The Legality and Reasonableness of the Leases Preclude Recovery

The courts below refused to recognize the controlling effect of the legality of the leases challenged. While Hanover attacked the leases executed between it and United for illegality and claimed the rental and other charges thereunder were excessive, arbitrary and non-competitive (18a-

19a), this claim was denied by the District Court, which held the leases to be legal and the charges thereunder reasonable (750a-53a). Nevertheless, recovery was granted to Hanover on the theory that it was entitled to the purchase of the machines as an alternative, and to damages for the difference if such purchase could be demonstrated to be cheaper. The trial court paid no attention to the legality of the leases "because Hanover is not suing on them" (753a). The Court of Appeals took a similar position (Pet. 8a-9a).

This Court in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 US 743, 752, in enforcing payment of purchase notes connected with allegedly illegal price discriminations, held that in the related treble damage suit Bruce's Juices would have to prove the prices charged to be illegal "in order to win". Here we have a holding that the lease prices were legal, Hanover's claim to damages being through a substituted sale price.

It is submitted that the conceded legality and reasonableness of the transactions actually had between the parties cuts off the refusal-to-sell avenue of recovery and that the failure of the courts below so to recognize was manifest error. Indeed, the Court of Appeals itself recognizes (Pet. 9a, n. 3) the conflict between its decision and that in *Turner Glass Corp*, v. *Hartford-Empire Co.*, 173 F. 2d 49 (CA 7 1949), cert. denied 338 US 839, rehearing denied 338 US 881.

5. Reflection of Cost of Capital Would Demonstrate the Absence of Damage

So, too, the courts below in their comparison of putative cost of purchase with cost of lease refused to take into account the cost of capital to one who chooses to purchase. The Court of Appeals overlooked the fact that *economists for both United and the shoe manufacturers as a whole had*

conceded the vital importance of this factor (350a-53a 597a-606a) in the negotiations for the plan of terminating United's old leases under paragraph 9 of Judge Wyzanski's decree (110 F. Supp. at 353). A proper application of cost of capital in the purchase-lease equation would have eliminated the supposed monetary advantages of purchase, as found by the District Court, and indeed demonstrated the advantages of lease.

The cost of capital factor was wrongly disregarded by the District Court and erroneously treated by the Court of Appeals as a "novel concept". In fact, it was basic to the purchase problem involved in this case and recognized as such by the parties in settlement of the plan under Judge Wyzanski's decree (350a-53a, 597a-606a). Here, as in the case of the tax ramifications recognized as appropriate by the Court of Appeals (Pet. 31a), it is "a distortion of reality" not to recognize cost of capital as a factor basic to the choice between purchasing and leasing.

6. Any Excess of Cost of Leasing Over Cost of Ownership Was Not Absorbed by Hanover.

In addition, the courts below failed to recognize that recoupment by Hanover of the lease charges in its sales prices eliminated any legal injury. The record filed in this Court upon United's previous application for certiorari with respect to the passing-on issue* demonstrates that as a matter of regular accounting practice Hanover, like its competitors, carried into its sale prices and recouped in its annual income statement the entire cost of the shoe machinery involved in this suit. That fact, however, has been held to be immaterial to Hanover's suit for damages on the ground that Hanover had its claim at the times of

*October Term 1960 No. 425, denied 364 US 901.

the assumed overcharges even if they were passed on (185 F. Supp. 826, 829, aff'd 281 F. 2d 481).

Such holding is contrary to the rule followed in the oil jobber cases. *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (CA 8 1945), cert. denied 326 US 734; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (CA 7 1943), cert. denied 321 US 792; *Leonard* v. *Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (WD Wis.), appeal dismissed on other grounds 130 F. 2d 535 (CA 7 1942); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (CA 8 1941), cert. denied 314 US 644. The Third Circuit itself has not followed the rule which it announced in the *Hanover* case where the charges passed on to the public involved payment for terminals. *Freedman* v. *Philadelphia Terminals Auction Co.*, 301 F. 2d 830, 832 (CA 3, 1962), cert. denied 371 US 829.

This varying construction of the same concept of injury contained in Clayton Act § 4 is unsound and should be corrected by review in this Court. The fact that Hanover was a consumer of the product and the plaintiff in *Freedman* a middleman (made a ground of distinction in 301 F. 2d at 833) is meaningless. See Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A. B. A. Antitrust Law Journal 5, 26-29 (1966). In view of Hanover's pricing system and its highly profitable operation, the fact is that there was no injury to the "business or property" of Hanover at the hands of United.

7. Hanover's Failure to Demand Purchase of Machines Indicates Absence of Injury and Precludes Recovery.

The failure of Hanover to demand that United sell instead of lease machines is a further bar to assertions of injury, not to say powerful evidence that there was no injury. Hanover for decades leased United's shoe machin-

ery without protest of any kind as to the leasing system and without demand of any sort to purchase the shoe machinery which it acquired by lease. The trial court recognized that Hanover never asked to buy the lease-only machines and did not protest its inability to buy (759a). This absence of any request or protest is excused by the courts below on the erroneous ground that a demand would in any event have been futile (Pet. 6a).

Yet the requirement of prior demand is clearly justified and has been unanimously imposed by Courts of Appeal in other cases. *Lawlor* v. *National Screen Service Corp.*, 270 F. 2d 146, 154 (CA 3 1959), cert. denied 362 US 922; *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F. 2d 533 (CA 2 1959), cert. denied 360 US 912; *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840, 845 (CA 2 1954); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568 (CA 7 1951), cert. denied 342 US 909; *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251 (CA 2 1959), cert. denied 361 US 885; see also *608 Hamilton Street Corp.* v. *Columbia Pictures Corp.*, 244 F. Supp. 193, 195 (ED Pa. 1965). Reliance is misplaced by the Court of Appeals (Pet. 6a) on *Continental Ore Co.* v. *Union Carbide and Carbon Co.*, 370 US 690, 698, in which the Court reversed dismissal of a private antitrust suit, since the Court found that actual prior demands had been made.

Waiver by the courts below of the necessity of prior demand in such a case as this is an open sesame to injustice. Hanover postponed any claim to buy United's shoe machines until after entry of the Government decree and promulgation of a plan for termination of the outstanding leases (761a). In the tranquil relationship between the parties extending back at least to 1912 (6a-7a) United had every right to assume that Hanover was completely satisfied

with the terms—adjudged reasonable by the courts below—on which if used the United machinery, equally with all other shoe manufacturers, to the increasing prosperity of Hanover. Substitution after the fact of an artificial and concocted sale price for the previously agreed lease terms and erection of the differential into a judgment for treble damages is an artificial operation repugnant to accepted standards of good faith and fair dealing. The function of prior demand is to put the claimant on record, put the supplier on notice and obviate such surprise tactics. Contentions as to the futility of demand do not destroy this valuable function. The claimant of a right of purchase must in all equity and fairness make overt assertion of that right before he can penalize the supplier with an imputed refusal on which damages are to be calculated and then trebled.

Moreover, if the *Alcoa* and *American Tobacco* decisions were enough to apprise United of a change in law as regards its leasing system (Pet. 22a-23a, 27a), certainly a demand by Hanover after the change in law could not be presumed futile.

8. Recovery is Barred by Limitations.

If injury had in fact been inflicted on the theory adopted by the trial court that the leasing system, which prevented Hanover from purchasing the United machines, was a monopolizing activity and had been held by Judge Wyzanski to be so from the beginning, the applicable statute of limitations (Pet. 26a-27a, 34a) necessarily would run from the inception of the lease relations between the parties in 1912 or earlier and the bar would have been completed early in the century. The trial court rejected this contention on the theory that United's monopolization was a continuing wrong (797a). However, this use of the concept of continuing wrong to circumvent the statute of limitations is

unsound because it "would effectively destroy the statute of limitations as a statute of peace." *Sherman* v. *Goerlichs*, 238 F. Supp. 728, 730 (ED Mich. 1963), aff'd per curiam, 341 F. 2d 988 (CA 6 1965), cert. denied 382 US 830; *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. N. J. 1957), aff'd on other grounds 307 F. 2d 210 (CA 3 1962).

The Court of Appeals rested its decision on another ground, viz., that under its holdings with respect to the limited retroactivity of Judge Wyzanski's decree United's putative duty to sell as established by the 1953 decree did not come into existence until 1946 and therefore no injury could have occurred before 1946 (Pet. 27a). In its supplemental opinion of May 18 that court added that United's conduct continuing within the limitations period "went beyond a mere continuation of the refusal to sell" and consisted of repeated collection of rentals on leases and repeated entry into new leases within the limitations period (Pet. 36a-37a).

As a matter of legal quality United's conduct after 1946 was exactly the same as its previous conduct, namely, a failure to sell the lease-only machines which (in point of fact) Hanover did not ask to buy. It is not the collection of rentals on leases admittedly legal and reasonable nor the entry into new machine leases of unquestioned legality and reasonableness which constituted the wrong charged. The wrong charged is the failure to offer for sale the machine types which Hanover held on lease in the damage period, and that failure pursued the same even and unchanging trend from 1899 to 1955. If a legal wrong at all, it was such more than 50 years ago. Adherence to the policy did not accrue new actions and the statute of limitations should operate as a complete defense even assuming a violation.

Conclusion

On all the grounds stated, if the petition in No. 335 is granted, this petition should also be granted and the cases consolidated for argument.

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